Supreme Court, U.S.
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NO. 95-1649

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

STATE OF KANSAS,

Petitioner,

v.

LEROY HENDRICKS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

BRIEF OF THE STATES OF WASHINGTON, ALABAMA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, HAWAII, IDAHO, ILLINOIS, IOWA, MARYLAND, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH DAKOTA, OHIO, OKLAHOMA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, VERMONT, WISCONSIN AND WYOMING, THE COMMONWEALTHS OF MASSACHUSETTS AND VIRGINIA, AND THE TERRITORIES OF AMERICAN SAMOA AND GUAM AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICI

Washington and the other named states submit this brief as amici curiae in support of the Petitioner, Kansas, which seeks review by Petition for a Writ of Certiorari of a Kansas State Supreme Court decision striking down that State's Sexually Violent Predator law. This brief is submitted on behalf of Washington and the other named amici by their Attorneys General. Accordingly, consent to its filing is not required. Sup. Ct. R. 37.5.

The Kansas Sexually Violent Predator law provides for the civil commitment of persons with a proven history of criminal sexual violence who suffer from a "mental abnormality or personality disorder" which makes them likely to commit predatory acts of sexual violence. Washington State was the first state in the nation to enact a Sexually Violent Predator Statute and the Kansas law is closely modeled on Washington's Statute. In addition to Washington and Kansas, four other states -- Wisconsin, Minnesota, California and Arizona -- have adopted similar laws.[1]

The Washington State Supreme Court upheld the constitutionality of Washington's Sexually Violent Predator Statute in *In re Young*, 122 Wn.2d 1, 857 P.2d 989 (1993). The Statute was subsequently struck down on substantive due process, double jeopardy and ex post facto grounds in *Young v. Weston*, 898 F. Supp. 744 (W.D. Wash. 1995).[2]

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[1]To date, six states have enacted sexually violent predator laws: Kan. Stat. Ann. § 59-29a01 *et seq.*; Wash. Rev. Code § 71.09 *et seq.*; Wis. Stat. Ch. 980; Minn. Stat. § 253B.02, subd. 18b; Cal. Welf. & Inst. Code § 6600 *et seq.*; and Ariz. Rev. Stat. § 13-4601-4609 (effective July 20, 1996).

[2]The district court granted the State's motion for a stay of its decision pending appeal by the State to the Ninth Circuit.

The State of Washington has appealed this decision to the Ninth Circuit Court of Appeals, and oral argument was heard on March 7, 1996. Currently, 36 persons are detained under Washington's Sexually Violent Predator law. As such, Washington State has a substantial interest in any litigation pertaining to the constitutionality of this Statute or others like it.

In addition to Washington, amici Wisconsin, California and Arizona have enacted laws which are substantially similar to the Statute at issue here. Certain of the amici are, as well, considering introducing similar laws. All of the amici share a common interest in protecting their citizens from sexually dangerous persons.

REASONS FOR GRANTING THE WRIT

I. THIS CASE RAISES A FUNDAMENTAL QUESTION REGARDING THE NATURE AND EXTENT OF THE STATES' POWER TO DEFINE THE MENTAL CONDITION REQUIRED FOR CIVIL COMMITMENT OF DANGEROUS SEXUAL PREDATORS.

This case presents the question of whether Kansas' Sexually Violent Predator Statute comports with substantive due process. At the core of this question is the fundamental issue of whether the State, within reasonable limits, has the power to identify and define those mental conditions which, when combined with a showing of dangerousness, permit the State to civilly commit an individual for the safety of others or whether the State, in fashioning such a definition, is restricted to a specific or "medical" definition of the term "mental illness."

To date, five courts have considered this question. Three courts -- the Washington State Supreme Court, the Wisconsin State Supreme Court and the Minnesota Court of Appeals -- have upheld statutes substantially similar to

Kansas' Sexually Violent Predator Statute and have held that the language of those statutes ensures that persons committed pursuant to their terms have mental conditions satisfying the requirements of substantive due process. *In re Young*, 857 P.2d 989; *State v. Post*, 197 Wis. 2d 279, 541 N.W. 2d 115 (1995); *In re Linehan*, 544 N.W. 2d 308 (Minn. Ct. App. 1996).[3] Two others -- the United States District Court for the Western District of Washington and the Kansas State Supreme Court -- have concluded that those States' Sexually Violent Predator Statutes, by defining a sexually violent predator as a person suffering from a "mental abnormality[4] or personality disorder" which makes that person likely to engage in predatory[5] acts of sexual violence, fail to meet the requirement that civilly committed persons be "mentally ill." *Young v. Weston*, 898 F. Supp. 745; *In re the Care and Treatment of Leroy Hendricks*, 912 P.2d 129 (Kansas 1996) (the subject of the present petition).

The question of the States' authority to define the mental condition required for civil commitment, together

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[3]A petition for a writ of certiorari in the *Post* case is currently pending before this Court, docket no. 95-8204. Review of the *Linehan* decision was granted by the Minnesota Supreme Court on March 19, 1996.

[4]Mental abnormality is defined in the Kansas Statutes Annotated as "a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others." Kan. Stat. Ann. § 59-29a02(b).

[5]Kansas' and Washington's statutes require that the future acts of sexual violence be "predatory" in nature; Wisconsin's does not. *See* Kan. Stat. Ann. § 59-29a02(a); Wash. Rev. Code § 71.09.020(1); Wis. Stat. Ch. 980.01(7).

with the broader question of the States' power to protect their citizens from persons with a proven history of sexual dangerousness through incapacitation and treatment, urgently requires resolution by this Court. Currently, five states have enacted statutes similar to Kansas' Sexually Violent Predator Statute, and numerous other states are considering such legislation. The five courts which have considered this issue have reached conclusions which cannot be reconciled with one another and leave state legislatures with no real guidance regarding the steps which they are constitutionally permitted to take to protect their citizens from dangerous and mentally disordered sex offenders. These States require guidance from this Court regarding this issue.

II. THE SUPREME COURTS OF WASHINGTON AND WISCONSIN HAVE DETERMINED THAT THEIR STATES' STATUTES SATISFY SUBSTANTIVE DUE PROCESS.

The Washington State Supreme Court was the first court in the nation to consider a sexually violent predator statute. That court, by a 6-3 majority, upheld the Statute's constitutionality against challenges on equal protection, ex post facto, double jeopardy, procedural due process and substantive due process grounds. *In re Young*, 857 P.2d 989. The court soundly rejected the argument that Washington's Statute permitted the State to hold individuals without proving that those persons are both mentally ill and dangerous.

The Statute, the court noted, uses the terms "mental abnormality or personality disorder" to describe that mental pathology required for commitment. While observing that the term "mental abnormality" is not defined in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (3rd ed. rev. 1987)

(hereinafter cited as DSM-III-R),[6] the court found that the legislature has given that term a meaning "which incorporates a number of recognized mental pathologies." *Id.*, 857 P.2d at 1001.[7] "What is critical for our purposes," the court wrote:

> is that psychiatric and psychological clinicians who testify in good faith as to mental abnormality are able to identify sexual pathologies that are as real and meaningful as other pathologies already listed in the DSM.

Id. citing Alexander D. Brooks, *The Constitutionality and Morality of Civilly Committing Violent Sexual Predators*, 15 U. Puget Sound L. Rev. 709, 733 (1991-1992).

The Washington State Supreme Court squarely rejected the argument that the term, because it was coined

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[6]The DSM-III-R was superseded in May 1994 by the publication of the DSM-IV.

[7]Both Young and Cunningham had been diagnosed with a mental disorder known as a "paraphilia." *In re Young*, 857 P.2d at 1002. Paraphilias are characterized by recurrent intense sexual urges and sexually arousing fantasies generally involving either (1) nonhuman objects, (2) the suffering or humiliation of oneself or one's partner (not merely simulated), or (3) children or other nonconsenting parties. DSM-III-R at 279. Both Cunningham and Young targeted adult females and as such were specifically diagnosed as suffering from Paraphilia Not Otherwise Specified: Rape. *In re Young*, 857 P.2d at 1002. Hendricks has been diagnosed as suffering from pedophilia. Pet. 3a. Pedophilia (DSM-IV 302.2) involves intense, recurrent, intense sexually arousing fantasies, sexual urges, or behaviors involving sexual activity with prepubescent children. In order to be diagnosed as Pedophilia, these urges, fantasies or behaviors must cause clinically significant distress or impairment in social, occupational or other important areas of functioning, and must have persisted for a period of at least six months. DSM-IV at 528.

by the legislature rather than the mental health community, did not describe a true mental illness. Noting that "over the years, the law has developed many specialized terms to describe mental health concepts" (*Id.* at 1001-1002, fn 5), the court pointed out that, according to expert testimony at trial, the statutory term "mental abnormality" was nearly identical to the notion of "mental disorder" as defined in the DSM-III-R. *Id.*

Two years later, the Wisconsin State Supreme Court upheld that State's Sexually Violent Person Statute. Rejecting the argument that the legislature, by targeting those with a "mental disorder that makes it substantially probable that the person will engage in acts of sexual violence"[8] (Wis. Stat. Ch. 980.01(7)), intended the Statute to apply to those who are not mentally ill, the court noted that "there is no talismanic significance that should be given to the term 'mentally ill.'" *State v. Post*, 541 N.W. 2d at 122. The United States Supreme Court, noted the Wisconsin court, had never enunciated a single definition "that must be used as the mental condition sufficient for involuntary mental commitments" (*Id.* at 123), and had itself used numerous terms to describe the mental condition of those properly subject to civil commitment.[9] *Id.* The various definitions of "mental illness" in Wisconsin's and

[8]Pursuant to Wis. Stat. Ch. 980.01(2), "mental disorder" is defined as "a congenital or acquired condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence."

[9]*See, for example, Addington v. Texas*, 441 U.S. 418, 425-26 (1979), discussing "the state's interest in committing the *emotionally disturbed* (emphasis added) and "the expanding concern of society with problems of *mental disorders*" (emphasis added).

other states' laws serve, the court noted, "a legal, not a medical function," adding that:

> Even the primary tool of clinical diagnosis in the psychiatric field, the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV), warns of a significant risk of misunderstanding when descriptions designed for clinical use are transplanted into the forensic setting.

Id.

This view is echoed by the three dissenting Justices of the Kansas State Supreme Court:

> There is no justification for linking constitutional standards to the shifting sands of academic thought reflected in the DSM-IV and its frequent revisions. "The clinical and scientific considerations involved in categorization of these conditions as mental disorders may not be wholly relevant to legal judgments, for example, that take into account such issues as individual responsibility, disability termination, and competency." DSM-IV, Cautionary Statement, xxvii. *In light of the DSM-IV's purpose and design, it would be misguided to rely on it as a source of constitutional limitation on legislative power.*

Hendricks, 912 P.2d 129 (Kansas 1996), Pet. 44a-45a (emphasis added).

The key to the constitutionality of the definition of mental disorder, the Wisconsin State Supreme Court wrote, is that it requires a nexus between the disorder with which the individual is diagnosed and the predisposition to engage in acts of sexual violence. *Post*, 541 N.W. 2d at 124.

Citing *Addington*, the court noted that "[t]he essence of federalism is that the states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold." *Id.* at 123 citing *Addington*, 441 U.S. at 431. The court then continued:

> Particularly when a legislature undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation.

Post, 451 N.W. 2d at 123, citing *Jones v. United States*, 463 U.S. 354, 370 (1983), citing *Marshall v. United States*, 414 U.S. 417, 427 (1974). The court concluded that the Statute was narrowly tailored to target only the most dangerous of sex offenders and as such, did not violate substantive due process. *Post*, 541 N.W. 2d at 124.

III. THE SUPREME COURT OF KANSAS AND THE DISTRICT COURT OF WASHINGTON HAVE ERRONEOUSLY CONCLUDED THAT KANSAS' AND WASHINGTON'S SEXUALLY VIOLENT PREDATOR STATUTES FAIL TO SATISFY A CONSTITUTIONAL REQUIREMENT OF "MENTAL ILLNESS."

The Supreme Court of Kansas, and the federal district court for the Western District of Washington before it, have both invalidated those States' Sexually Violent Predator Statutes. Based in large part on a narrow and formalistic reading of this Court's statements in *Foucha v. Louisiana*, 504 U.S. 71 (1992), requiring "mental illness" as a prerequisite for civil commitment there, both courts have erroneously concluded that the State Statutes in question permit the civil commitment of persons who are not "mentally ill" in a constitutional sense.

In *Young v. Weston*, the United States District Court began its substantive due process analysis with a discussion of Washington's Sexually Violent Predator Statute's legislative findings.[10] The legislature, the court concluded, by distinguishing sexually violent predators from persons subject to Washington's general civil commitment law, "expressly disavow[ed] the notion that the targeted group of persons are mentally ill." *Young v. Weston*, 898 F. Supp. at 749. The legislative findings indicate that persons in this targeted group "do not have a mental disease or defect that renders them appropriate for the existing Involuntary Treatment Act," and suffer from "antisocial personality features which are unamenable to existing mental illness treatment modalities." *Id.* This language, the court wrote, reveals the Washington

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[10]Those findings read as follows: The legislature finds that a small but extremely dangerous group of sexually violent predators exist who do not have a mental disease or defect that renders them appropriate for the existing Involuntary Treatment Act, chapter 71.05 RCW, which is intended to provide short-term treatment to individuals with serious mental disorders and then return them to the community. In contrast to persons appropriate for civil commitment under chapter 71.05 RCW, sexually violent predators generally have antisocial personality features which are unamenable to existing mental illness treatment modalities and those features render them likely to engage in sexually violent behavior. The legislature further finds that sexually violent predators' likelihood of engaging in repeat acts of predatory sexual violence is high. The existing Involuntary Treatment Act, chapter 71.05 RCW, is inadequate to address the risk to reoffend because these offenders do not have access to potential victims and, therefore, they will not engage in an overt act during confinement as required by the Involuntary Treatment Act for continued confinement. The legislature further finds that the prognosis for curing offenders is poor, the treatment needs of this population are very long-term, and the treatment modalities for this population are very different than the treatment modalities for people appropriate for commitment under the Involuntary Treatment Act. Wash. Rev. Code § 71.09.010.

legislature's "abandonment" of the mental illness requirement. *Id.*

That the Washington legislature did not intend to target those who are mentally ill, stated the court, is further evidenced by the Statute's use of the term "mental abnormality," a term "which has neither a clinically significant meaning nor a recognized diagnostic use among treatment professionals." *Id.* at 750:

> The legislature's decision to employ a term unrecognized in the psychiatric community, coupled with . . . a definition of no value to treatment professionals is an indication that the State did not intend the Statute to capture only the seriously mentally ill.

Id. fn 2. The court thus concluded that Washington's Statute was not designed to provide for the commitment of dangerous "mentally ill or mentally disordered persons." *Id.* Rather, the Statute targets persons with "antisocial personality features," a result prohibited by *Foucha*. *Id.* By failing to require that persons detained be mentally ill, the court wrote, "the Statute here permits indefinite incarceration based on little more than a showing of potential future dangerousness." *Id.* at 749.

Like the United States District Court, the Kansas State Supreme Court concludes that the legislative findings reveal an intent to distinguish sexually violent predators from the "mentally ill."[11] Sexually violent predators, unlike persons appropriate for commitment under that State's general civil commitment law, have "antisocial personality features" or a "mental abnormality." *Hendricks*, 912 P.2d 129 (1996), Pet. 17a. Noting that

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[11]For purposes of this analysis, the findings of both statutes are substantially identical.

these antisocial personality features are, according to the legislature's findings, "unamenable to existing mental illness treatment modalities" (Kan. Stat. Ann. § 59-29a01), the court reasoned that, "[i]f there is nothing to treat [under Kansas' general civil commitment law], there is no mental illness." *Id.* at 15a. Neither the language of the Act nor the State's evidence, wrote the court, supports a finding that "mental abnormality or personality disorder" constitutes a "mental illness" as defined in Kansas' general civil commitment statute. *Id.* As such, the Act does not satisfy the constitutional standard set out in *Addington* and *Foucha*. *Id.*

While the Kansas State Supreme Court does not propose a specific medical definition of mental illness, its opinion strongly suggests that any statutory definitions of mental illness must comport with such a model or, in the alternative, must use the words "mental illness." Criticizing the Washington State Supreme Court for a "selective and inconsistent use" of the DSM-III-R, the court strongly implies that, in order to qualify as a "mental illness" for substantive due process purposes, a mental pathology must be contained within that treatise. *See Id.* at 13a. Other language in the opinion, however, suggests that this constitutionally adequate model is expressed by the definition of mental illness contained in Kansas' general civil commitment law.[12] After reviewing the definition of

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[12]Pursuant to Kan. Stat. Ann. § 59-2902(h), a mentally ill person is any person who:

> (1) [i]s suffering from a severe mental disorder to the extent that such person is in need of treatment;
> (2) lacks capacity to make an informed decision concerning treatment; and
> (3) is likely to cause harm to self or others.

mental illness under Kansas' general civil commitment statute, the court concludes that:

> neither the language of the [Sexually Violent Predator] Act nor the State's evidence supports a finding that "mental abnormality or personality disorder" as used in 59-29a02(a) is a "mental illness" as defined in 59-2902(h). Absent such a finding, the Act does not satisfy the constitutional standard set out in *Addington* and *Foucha*.

Id. at 19a. In other words, if an individual is not suitable for commitment under Kansas' general civil commitment statute, he or she cannot be civilly committed on any other grounds under any other statute. The court thus appears to conclude that the requirements of substantive due process are embodied in existing Kansas State law. The court ignores, however, the fact that, while Kansas' general civil commitment statute does use the magic words "mental illness," the statutory definition of that term bears no resemblance to any definition contained in the DSM.[13]

IV. THIS CASE PRESENTS A FUNDAMENTAL QUESTION OF SUBSTANTIVE DUE PROCESS THAT REQUIRES RESOLUTION BY THIS COURT.

The field of mental health is clearly one which is "fraught with medical and scientific uncertainties." *Marshall*, 414 U.S. at 427. "Psychiatry is not . . . an

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[13]The DSM-IV does not use or define the term "mental illness." "Mental disorder" is defined as a "clinically significant behavioral or psychological syndrome or pattern that occurs in an individual and that is associated with present distress (e.g., a painful symptom) or disability (i.e., impairment in one or more important areas of functioning) or with a significantly increased risk of suffering death, pain, disability, or an important loss of freedom. DSM-IV at xxi.

exact science, and psychiatrists disagree widely and frequently on what constitutes mental illness." *Ake v. Oklahoma*, 470 U.S. 68, 81 (1985). The power of the states to act to protect their most vulnerable citizens should not, however, depend upon "research conducted in the scientific community." *Jones v. United States*, 564 U.S. 354, 364, fn 13 (1983). As has been demonstrated in Washington, Wisconsin, California, Kansas and Minnesota, mental health professionals are able, using definitions crafted by their States' legislatures, to identify mental pathologies which predispose particular sex offenders to commit further sexually violent acts. Two courts have, however, by narrowly focusing on either terminology or definitions provided in the DSM, invalidated these Statutes, concluding that they permit the detention of persons not "mentally ill."

The question of the States' authority to define that mental condition required for civil commitment, together with the broader question of the States' power to protect its citizens from persons with a proven history of sexual dangerousness through incapacitation and treatment, urgently requires resolution by this Court. Not only those five states which have enacted statutes similar to Kansas' Sexually Violent Predator Statute, but the numerous other states which are considering such legislation urgently require guidance from this Court regarding this issue.

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CONCLUSION

For the foregoing reasons, Washington and the other named amici respectfully request that this Court grant the State of Kansas' Petition for a Writ of Certiorari.

Respectfully submitted,

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